

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
RICHARD E. & SABELLE F. GRAY	:	ORDERS
for Redetermination of a Deficiency or for Refund of	:	DTA NO. 818339,
New York State and New York City Personal Income	:	818340 & 818341
Taxes under Article 22 of the Tax Law and the New	:	
York City Administrative Code for the Years 1984	:	
through 1987 and 1992 through 1994.	:	

Petitioners, Richard E. & Sabele F. Gray, 50 North Street, Litchfield, Connecticut 06759, filed a petition for redetermination of a deficiency or for refund of New York State and New York City personal income taxes under Article 22 of the Tax Law and the New York City Administrative Code for the years 1984 through 1987 and 1992 through 1994.¹

A hearing was scheduled before Administrative Law Judge Timothy Alston at the offices of the Division of Tax Appeals, New York State Housing Finance Agency, 641 Lexington Avenue, New York, New York on Tuesday and Wednesday, May 7 and 8, 2002 at 10:30 A.M. and 9:15 A.M., respectively. Petitioners failed to appear and a default determination was duly issued. Petitioners have made a written request dated May 31, 2002 that the default determination be vacated. On July 8, 2002, the Division of Taxation filed a response in opposition to petitioners' application to vacate the default.

¹ Petitioner Sabele F. Gray's involvement in this matter appears to be limited to having filed a joint return with her husband. Accordingly, references to the term "petitioner" shall be understood to mean Richard E. Gray.

Petitioner Richard E. Gray appeared on his own behalf and for his spouse. The Division of Taxation (“the Division”) appeared by Barbara G. Billet, Esq. (Kevin Law, Esq.).

Upon a review of the entire case file in this matter as well as the arguments presented for and against the request that the default determination be vacated, Chief Administrative Law Judge Andrew F. Marchese issues the following order.

FINDINGS OF FACT

1. On February 7, 2001, the Division of Tax Appeals received three petitions from Richard E. and Sabele F. Gray protesting notices of deficiency issued by the Division of Taxation which asserted deficiencies of personal income tax for the City and State of New York for the tax years 1984 through 1987 and 1992 through 1994.

2. The calendar clerk of the Division of Tax Appeals sent a Notice to Schedule Hearing & Prehearing Conference dated May 15, 2001 to petitioners and to the Division of Taxation advising them to contact each other to set a mutually convenient hearing date during the months of September or October 2001. On July 6, 2001, the Division of Taxation and petitioners’ then representative selected the dates of November 6, 7 and 8, 2001 as the hearing dates. The location of the hearing was to be Buffalo, New York. On September 6, 2001, petitioners’ representative withdrew from the case. The representative asked that the hearing be adjourned to allow petitioners time to obtain a new representative. On September 7, 2001, this request was denied by the Assistant Chief Administrative Law Judge of the Division of Tax Appeals since at that point there was still sufficient time to obtain new counsel before the hearing.

3. On October 1, 2001, the Assistant Chief Administrative Law Judge issued a Notice of Hearing advising the parties that the hearing was scheduled for November 6, 7 and 8, 2001 in Buffalo, New York. Petitioners responded to the Notice of Hearing by a letter dated October 9,

2001 and requested that the hearing be adjourned to allow them more time to retain new counsel. Petitioners asserted that they had been unable to retain new counsel due to the impact of the World Trade Center tragedy. By letter dated October 11, 2001, the Assistant Chief Administrative Law Judge adjourned the hearing. A new hearing date of December 17, 2001 was selected by the parties. In addition the parties elected to move the location of the hearing to Manhattan.

4. On November 12, 2001, the Assistant Chief Administrative Law Judge issued a second Notice of Hearing to the parties advising them of the hearing scheduled for Monday, December 17, 2001 at 10:30 A.M. On December 12, 2001, attorney Richard M. Asche advised the Division of Tax Appeals that petitioner Richard Gray had been incarcerated in the Queens House of Detention in New York City pursuant to an order of the New York Supreme Court dated November 17, 2001, in connection with a civil contempt proceeding unrelated to the instant matter. Due to Mr. Gray's incarceration, the hearing was adjourned once again until February 14, 2002.

5. On January 7, 2002, yet another hearing notice advised the parties that the hearing had been rescheduled for Thursday, February 14, 2002. However, on January 29, 2002, that hearing was adjourned and the parties agreed to hearing dates of May 7 and 8, 2002. A Notice of Hearing dated April 1, 2002 advised the parties that the hearing would be held on May 7 and 8, 2002 at 10:30 A.M. and 9:15 A.M. By letter dated May 1, 2002, attorney Barry J. Quinn requested yet another adjournment of the hearing due to Mr. Gray's continued incarceration. On that same date the Assistant Chief Administrative Law Judge advised Mr. Quinn by letter that inasmuch as he did not represent Mr. Gray, he could not request an adjournment on his behalf. On May 2, 2002, Kevin Law, Esq., of the Office of Counsel of the Division of Taxation made a

request on petitioners' behalf for an adjournment of the hearing until 60 days after Mr. Gray is released from incarceration. Mr. Law indicated that he had no objection to the request. By letter dated May 2, 2002, said adjournment request was denied by the Assistant Chief Administrative Law Judge. On May 7, 2002, the Division of Tax Appeals received a letter dated May 3, 2002 from petitioner again requesting adjournment of the hearing.

6. On May 7, 2002 at 10:30 A.M., Administrative Law Judge Timothy Alston called the *Matter of Richard E. and Sabele F. Gray*, involving the three petitions here at issue. Present was Mr. Law as representative for the Division of Taxation. Neither petitioner appeared, and no representative appeared on their behalf. The attorney for the Division of Taxation moved that petitioners be held in default. On May 16, 2002, Administrative Law Judge Alston issued three orders finding petitioners in default with respect to each of their petitions.

7. By letter dated May 31, 2002, petitioners requested that the default determination of May 16, 2002 be vacated. In this request, Mr. Gray states that he has been incarcerated since November 19, 2001, first at the Queens House of Detention and since January 2002, at the Ste. Genevieve County, Missouri jail. Mr. Gray also states that he has no attorney and was planning to represent himself. He also states that his incarceration was sudden and without warning. Mr. Gray goes on to complain that his request for an adjournment of the May 7, 2002 hearing was denied even though the request was made by both parties.

8. With respect to the merits of his case, Mr. Gray indicates in his letter that his case involves matters of domicile, residence and days inside and outside of New York State. Moreover, he states that he has three boxes of documents to be introduced as proof in his case.

9. By letter dated July 8, 2002, the Division of Taxation has opposed petitioners' request. The Division of Taxation asserts that the hearing dates were agreed to by the parties and

communicated to Mr. Gray through his secretary Ms. Carlson almost three months in advance of the hearing. At that time petitioner was advised that no further adjournments would be granted. In addition, the Division of Taxation also disputes Mr. Gray's contention that his incarceration was sudden and unexpected. To prove this point, the Division has included as part of its response a copy of the decision of the court in the *Matter of Richardson v. Gray* (726 NYS2d 105 [1st Dept. 2001]). In this decision dated June 14, 2001, the Appellate Division directs the lower court "to hold a hearing, where Mr. Gray will have the burden of either establishing that he does not have, and has not had, the financial ability to return the requested funds, since entry of the first contempt order, or be confined to prison for contempt pursuant to Judiciary Law sec. 753 until such time as his outstanding debts are satisfied"

10. With respect to petitioners' proof of a meritorious case, the Division of Taxation asserts that, "petitioners have not provided one shred of evidence to support the proposition that they have a meritorious case."

CONCLUSIONS OF LAW

A. As provided in the Rules of Practice and Procedure of the Tax Appeals Tribunal, "In the event a party or the party's representative does not appear at a scheduled hearing and an adjournment has not been granted, the administrative law judge shall, on his or her own motion or on the motion of the other party, render a default determination against the party failing to appear." (20 NYCRR 3000.15[b][2].) The rules further provide that: "Upon written application to the supervising administrative law judge, a default determination may be vacated where the party shows an excuse for the default and a meritorious case." (20 NYCRR 3000.15[b][3].)

B. There is no doubt based upon the record presented in this matter that petitioners did not appear at the scheduled hearing or obtain an adjournment. Therefore, the administrative law

judge correctly granted the Division's motion for default pursuant to 20 NYCRR 3000.15(b)(2) (*see, Matter of Zavalla*, Tax Appeals Tribunal, August 31, 1995; *Matter of Morano's Jewelers of Fifth Avenue*, Tax Appeals Tribunal, May 4, 1989). Once the default order was issued, it was incumbent upon petitioners to show a valid excuse for not attending the hearing and to show that they had a meritorious case (20 NYCRR 3000.15[b][3]; *see also, Matter of Zavalla, supra; Matter of Morano's Jewelers of Fifth Avenue, supra*).

C. Petitioner has failed to establish a reasonable cause for his failure to appear at his hearing. Petitioner has been less than candid in his dealings with the Division of Tax Appeals. In October of 2001, petitioner asked for an adjournment because he needed to retain new counsel. It is eleven months later and petitioner has yet to retain new counsel. Instead, petitioner states that it is now his desire to appear *pro se* even though he does not seem able to appear in person in this forum because of his incarceration. Moreover, while petitioner claims that his incarceration was sudden and unexpected, such claim is clearly not the truth. At least as early as June 14, 2001, when the Appellate Division handed down its decision in the *Matter of Richardson v. Gray (supra)*, petitioner was alerted to the possibility of his incarceration.

While petitioner complains that an additional adjournment should have been given because both parties asked for it, it must be noted that petitioner had already received three adjournments of his hearing at that point. Moreover, petitioner failed to comply with the requirements of the Rules of Practice and Procedure of the Tax Appeals Tribunal which provide that "[a]t the written request of either party, made on notice to the other party and received 15 days in advance of the scheduled hearing date, an adjournment may be granted where good cause is shown. In the event of an emergency, an adjournment may be granted on less notice." (20 NYCRR 3000.15[b][1].) Inasmuch as petitioner waited until six days before the hearing date to

request an adjournment, the request was untimely. Petitioner's incarceration was longstanding at that point and could hardly be called an emergency.

Faced with his impending hearing, petitioner was under an obligation to secure his release from incarceration for purposes of attending his tax hearing or, failing that, to secure suitable counsel to represent him at hearing. He chose to do neither of these and instead relied on a last minute request for an additional adjournment. Such a tactic is risky at best and now leaves petitioner without a reasonable cause for his failure to appear at hearing.

D. Petitioner has also failed to establish a meritorious case. He states that he has legitimate issues to be presented and that "the issues involved in this case relate to matters of domicile, residence and number of days inside and outside of NY State." Petitioner does not specify how he disagrees with the Division of Taxation or why he thinks his position is correct. Moreover, while petitioner states that he has three boxes of documents to be introduced as proof in his case, he has provided no specifics. He has not explained what the documents are or what they would prove. Accordingly, I find that petitioner has not established a meritorious case.

E. It is ordered that the request to vacate the default order be, and it is hereby, denied and the Default Determination issued May 16, 2002 is sustained.

DATED: Troy, New York
October 3, 2002

/s/ Andrew F. Marchese
CHIEF ADMINISTRATIVE LAW JUDGE